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No. 324

In the Supreme Court of the United States

OCTOBER TERM, 1962

STATE OF ALABAMA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States District Court for the Middle District of Alabama is reported at 192 F. Supp. 677. The opinion of the Court of Appeals for the Fifth Circuit (R. 955) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1962. The petition for writ of certiorari was filed on August 11, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a suit brought by the United States under the Civil Rights Act of 1957,[1] as amended in 1960,[2] 42 U.S.C. (Supp. II) 1971, a district court may affirmatively order a board of registrars to place on the list of registered voters the names of certain qualified Negro citizens found by the court to have been discriminatorily denied registration because of their race and color.

STATUTE INVOLVED

42 U.S.C. 1971, as amended May 6, 1960, is reprinted in the Appendix, *infra*, pp. 9–15.

STATEMENT

In 1958, virtually all the white citizens of voting age in Macon County, Alabama, were registered; only about ten percent of its Negro citizens, who constitute 83 percent of the total population, were registered (Pl. Exs. 32, 65). Believing that this imbalance resulted from a course of discrimination, the United States, proceeding under 42 U.S.C. 1971(c), brought this action against the members of the Board of Registrars of Macon County and the State of Alabama[3] (R.

[1] 71 Stat. 637.

[2] 74 Stat. 90.

[3] These proceedings were begun after remand by this Court. The district court originally dismissed the complaint as to all defendants, holding (1) that the individual defendants had been sued only as registrars, and that having under Alabama law effectively resigned their offices they were not suable in their official capacities; (2) that the Board of Registrars was not a suable legal entity, and (3) that the Civil Rights Act of 1957 did not authorize suit against the State. 171 F. Supp. 720. The Court of Appeals for the Fifth Circuit affirmed. 267 F. 2d 808.

Pending review in this Court, Congress passed the Civil

2, 15). In its amended and supplemental complaint the United States alleged that the petitioners had engaged in numerous racially discriminatory acts and practices which had deprived Negro citizens in Macon County of their right to register to vote in violation of the Fifteenth Amendment (R. 15).

The pertinent allegations charged the petitioners with bringing about and perpetuating this situation by applying different and more stringent standards to Negroes than to white persons in every phase of the registration process, and by refusing to register, because of their race, fully qualified Negroes who had applied for registration (R. 19). Among other things, the complaint requested the district court to enjoin the petitioners from failing or refusing to register, because of their race, certain fully qualified Negroes and others similarly situated who had applied for registration, and from permitting their names to remain off the current list of qualified voters of Macon County (R. 22–25).

On November 17, 1960, the district court denied a motion of the petitioners to dismiss the amended and

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Rights Act of 1960. Section 601(b) of the Act amends 42 U.S.C. 1971(c) by expressly authorizing suit against a State in actions of this kind (*infra*, Appendix, p. 10). This Court held that by virtue of the provisions of Section 601(c) the district court had jurisdiction to entertain the action against the State. Accordingly, on May 16, 1960, the Court vacated the judgments of the court of appeals and the district court, and remanded the case to the district court with instructions to reinstate the action as to the State of Alabama, and for further proceedings. 362 U.S. 602, 604. Thereafter, new registrars were appointed and included as parties defendant.

supplemental complaint (R. 27, 13, 188 F. Supp. 759), and the case went to trial before the court sitting without a jury. On March 17, 1961, the district court entered a decree which enjoined the petitioners from engaging in any act or practice which involves or results in distinctions based on race or color between Negro and other citizens in the registration for voting and the voting process in Macon County, and, in addition to other affirmative and preventive relief, ordered the petitioners, within ten days from the date of the decree, to place upon the current and permanent registration rolls the names of sixty-four specified Negro citizens, unless one or more of such citizens had died or become disqualified for registration since the date of their application or applications (R. 928–929, 192 F. Supp. 677). The district court's decree was based on its conclusion that the evidence in the case was "so abundantly clear in portraying the discriminatory acts and practices, which acts and practices clearly violate the Constitution and laws of the United States, * * * that [the] case warrants not only a prohibitory decree but a decree mandatory in nature." (R. 918, 192 F. Supp. 677, 682).

The petitioners thereupon filed with the district court a motion for stay, pending appeal, of those portions of the order which conditionally required the petitioners to place upon the registration rolls the names of sixty-four named Negro citizens (R. 936), presenting the court with certain information indicating that some of those citizens might, as of the

time of the motion, be disqualified. On March 27, 1961, the court, upon consideration of this information, temporarily stayed its order as to fourteen of those named (R. 939) pending further investigation.[4] In all other respects, the district court denied the motion for stay (R. 940). On the same day, the petitioners moved orally for a stay pending appeal before the Chief Judge of the Court of Appeals for the Fifth Circuit. The motion was denied (R. 942).

On March 22, 1962, the petitioners appealed to the Court of Appeals, challenging only that portion of the district court's decree which required them to issue registration certificates to 54 specified Negro applicants found by the court (and not disputed by the defendants) to be fully qualified to vote and previously rejected solely on grounds of their race. On June 1, 1962, the court of appeals affirmed. (R. 955, 979).

ARGUMENT

1. Petitioners contend that the district court lacked jurisdiction to issue an affirmative order requiring the petitioners to register certain qualified Negro applicants found by the court to have been discriminatorily denied registration because of their race and color. This contention is plainly without merit.

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[4] On April 6, 1961, respondent filed a report with the district court verifying part of the information which had been furnished by petitioners. On April 7, 1961, the court entered an order amending its order of March 17, 1961 by removing the names of ten Negro citizens from the list of those ordered to be registered (R. 943).

In *United States* v. *Thomas*, 362 U.S. 58, affirming *United States* v. *McElveen*, 180 F. Supp. 10 (E.D. La.), this Court, fully informed of the pertinent facts,[5] affirmed an order under the Civil Rights Act of 1957 which, *inter alia*, directed the registrar to restore certain electors to the voting rolls. While the petitioners in this case are required to register certain individuals for the first time, the considerations underlying the court's action in *Thomas* apply here with equal force. In each instance fully qualified individuals were deprived of their status as voters solely because of their race and color. To contend that the Civil Rights Act of 1957 permits redress in one case and not the other would be to ignore the "broad remedial purposes" of that Act (*United States* v. *McElveen*, *supra*, at 14; *United States* v. *Raines*, 189 F. Supp. 121, 134 (M.D. Ga)), as well as the inherent power of a court of equity to "use any available remedy to make good the wrong done." *Bell* v. *Hood*, 327 U.S. 678, 684; *Dooley* v. *United States*, 182 U.S. 222 and cases cited and discussed at 228–230; *Board of Commissioners* v. *United States*, 308 U.S. 343, 349–50; *Porter* v. *Warner Co.*, 328 U.S. 395, 398. In both cases the action is preventive, as well as remedial. Whether the order directs restoration to the voting rolls after an illegal purge or commands initial registration, the precedent

[5] The injunction issued by the district court (Transcript of Record, No. 667, Oct. Term 1959, pp. 163–165; Pet. App., pp. 1a–4a) was challenged, *inter alia*, because it granted affirmative relief (Brief for Curtis M. Thomas, pp. 2, 12, 42, 48–49, 51), and the United States fully discussed the court's power to issue the mandatory injunction (Brief for the United States, pp. 29–41).

tends to assure future compliance and prevent further discrimination. Cf. *Porter* v. *Warner Co. supra,* at 400.

Since *United States* v. *Thomas, supra,* the federal courts have not hesitated to grant relief comparable to the order challenged here. See *United States* v. *Raines, supra,* at 136; *United States* v. *Association of Citizens Councils of Louisiana,* 196 F. Supp. 908, 911-912 (W.D. La.). The district court in this case likewise concluded that it was empowered to grant affirmative relief. We submit that, in light of the unqualified language of the statute,[6] its broad purpose, and the relevant precedents, it was clearly correct.

2. Petitioners apparently contend, however, that, even if the court had power to grant mandatory relief, it could not do so in this case because the Attorney General's complaint was not framed to that end. The point is frivolous. The complaint, in terms, prayed for an order enjoining the petitioners from "[r]ailing or refusing to register the persons listed in 'Exhibit A' attached to this Complaint, and others similarly situated, and from permitting their names to remain off the current list of qualified voters of Macon County, Alabama" (R. 22-23). Moreover, as Rule 54(c), F. R. Civ. P., expressly says, "* * * every final

[6] The legislative history of the Act also supports the propriety of affirmative orders to ensure the registration of qualified applicants. See *e.g.*, testimony of Attorney General Brownell in Hearing Before the House Committee on the Judiciary, 84th Cong., 1st Sess., incorporated into Hearings on Civil Rights Before Subcommittee No. 5 of the House Committee on the Judiciary, 85th Cong., 1st Sess., pp. 571-572; also remarks during debates on the bill, 103 Cong. Rec. 12572, 12460.

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judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." The order directing registration of certain named voters was plainly warranted here.[1]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1962.

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[1] Petitioners could not be prejudiced by the court's decision to grant affirmative relief. Not only did the complaint apprise them that such relief was requested, but the court's order specifically gave them full opportunity to demonstrate that any of the sixty-four named individuals had subsequently become disqualified (R. 928).

APPENDIX

STATUTE INVOLVED

42 U.S.C. 1971

Voting rights—Race, color, or previous condition not to affect right to vote

(a) All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

Intimidation, threats, or coercion

(b) No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates or Commissioners from the Territories or possessions, at any general, special, or primary election held solely or in part for the purpose of selecting or electing any such candidate.

Preventive relief; injunction; costs; State as party defendant.

(c) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person.

Whenever, in a proceeding instituted under this subsection any official of a State or subdivision thereof is alleged to have committed any act or practice constituting a deprivation of any right or privilege secured by subsection (a) of this section, the act or practice shall also be deemed that of the State and the State may be joined as a party defendant and, if, prior to the institution of such proceeding, such official has resigned or has been relieved of his office and no successor has assumed such office, the proceeding may be instituted against the State.

Jurisdiction; exhaustion of other remedies

(d) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law.

Order qualifying person to vote; application; hearing; voting referees; transmittal of report and order; certificate of qualifications; definitions

(c) In any proceeding instituted pursuant to subsection (c) of this section in the event the court finds that any person has been deprived on account of race or color of any right or privilege secured by subsection (a) of this section, the court shall upon request of the Attorney General and after each party has been given notice and the opportunity to be heard make a finding whether such deprivation was or is pursuant to a pattern or practice. If the court finds such pattern or practice, any person of such race or color resident within the affected area shall, for one year and thereafter until the court subsequently finds that such pattern or practice has ceased, be entitled, upon his application therefor, to an order declaring him qualified to vote, upon proof that at any election or elections (1) he is qualified under State law to vote, and (2) he has since such finding by the court been (a) deprived of or denied under color of law the opportunity to register to vote or otherwise to qualify to vote, or (b) found not qualified to vote by any person acting under color of law. Such order shall be effective as to any election held within the longest period for which such applicant could have been registered or otherwise qualified under State law at which the applicant's qualifications would under State law entitle him to vote.

Notwithstanding any inconsistent provision of State law or the action of any State officer or court, an applicant so declared qualified to vote shall be

permitted to vote in any such election. The Attorney General shall cause to be transmitted certified copies of such order to the appropriate election officers. The refusal by any such officer with notice of such order to permit any person so declared qualified to vote to vote at an appropriate election shall constitute contempt of court.

An application for an order pursuant to this subsection shall be heard within ten days, and the execution of any order disposing of such application shall not be stayed if the effect of such stay would be to delay the effectiveness of the order beyond the date of any election at which the applicant would otherwise be enabled to vote.

The court may appoint one or more persons who are qualified voters in the judicial district, to be known as voting referees, who shall subscribe to the oath of office required by section 16 of Title 5, to serve for such period as the court shall determine, to receive such applications and to take evidence and report to the court findings as to whether or not at any election or elections (1) any such applicant is qualified under State law to vote, and (2) he has since the finding by the court heretofore specified been (a) deprived of or denied under color of law the opportunity to register to vote or otherwise to qualify to vote, or (b) found not qualified to vote by any person acting under color of law. In a proceeding before a voting referee, the applicant shall be heard ex parte at such times and places as the court shall direct. His statement under oath shall be prima facie evidence as to his age, residence, and his prior efforts to register or otherwise qualify to vote. Where proof of literacy or an understanding of other subjects is required by valid provisions of State law, the answer of the applicant, if written, shall be in-

cluded in such report to the court; if oral, it shall be taken down stenographically and a transcription included in such report to the court.

Upon receipt of such report, the court shall cause the Attorney General to transmit a copy thereof to the State attorney general and to each party to such proceeding together with an order to show cause within ten days, or such shorter time as the court may fix, why an order of the court should not be entered in accordance with such report. Upon the expiration of such period, such order shall be entered unless prior to that time there has been filed with the court and served upon all parties a statement of exceptions to such report. Exceptions as to matters of fact shall be considered only if supported by a duly verified copy of a public record or by affidavit of persons having personal knowledge of such facts or by statements or matters contained in such report; those relating to matters of law shall be supported by an appropriate memorandum of law. The issues of fact and law raised by such exceptions shall be determined by the court or, if the due and speedy administration of justice requires, they may be referred to the voting referee to determine in accordance with procedures prescribed by the court. A hearing as to an issue of fact shall be held only in the event that the proof in support of the exception disclose the existence of a genuine issue of material fact. The applicant's literacy and understanding of other subjects shall be determined solely on the basis of answers included in the report of the voting referee.

The court, or at its direction the voting referee, shall issue to each applicant so declared qualified a certificate identifying the holder thereof as a person so qualified.

Any voting referee appointed by the court pursuant to this subsection shall to the extent not incon-

sistent herewith have all the powers conferred upon a master by rule 53(c) of the Federal Rules of Civil Procedure. The compensation to be allowed to any persons appointed by the court pursuant to this subsection shall be fixed by the court and shall be payable by the United States.

Applications pursuant to this subsection shall be determined expeditiously. In the case of any application filed twenty or more days prior to an election which is undetermined by the time of such election, the court shall issue an order authorizing the applicant to vote provisionally; *Provided, however,* That such applicant shall be qualified to vote under State law. In the case of an application filed within twenty days prior to an election, the court, in its discretion, may make such an order. In either case the order shall make appropriate provision for the impounding of the applicant's ballot pending determination of the application. The court may take any other action, and may authorize such referee or such other person as it may designate to take any other action, appropriate or necessary to cary out the provisions of this subsection and to enforce its decrees. This subsection shall in no way be construed as a limitation upon the existing powers of the court.

When used in the subsection, the word "vote" includes all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted and included in the appropriate totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election; the words "affected area" shall mean any subdivision of the State in which the laws of the State relating to voting are or have been to any extent administered by

a person found in the proceeding to have violated subsection (a) of this section; and the words "qualified under State law" shall mean qualified according to the laws, customs, or usages of the State, and shall not, in any event, imply qualifications more stringent than those used by the persons found in the proceeding to have violated subsection (a) in qualifying persons ~~other~~ than those of the race or color against which the pattern or practice of discrimination was found to exist.

Contempt; assignment of counsel; witnesses

(f) Any person cited for an alleged contempt under this Act shall be allowed to make his full defense by counsel learned in the law; and the court before which he is cited or tried, or some judge thereof, shall ~~immediately~~, upon his request, assign to him such counsel, not exceeding two, as he may desire, who shall have free access to him at all reasonable hours. He shall be allowed, in his defense to make any proof that he can produce by lawful witnesses, and shall have the like process of the court to compel his witnesses to appear at his trial or hearing, as is usually granted to compel witnesses to appear on behalf of the prosecution. If such person shall be found by the court to be financially unable to provide for such counsel, it shall be the duty of the court to provide such counsel.

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